No. 867

MAY 31 1951

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

ORO FINO CONSOLIDATED MINES, INCORPORATED,
Petitioner,

v.

THE UNITED STATES.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF CLAIMS

REPLY BRIEF FOR THE PETITIONER IN SUPPORT OF THE PETITION

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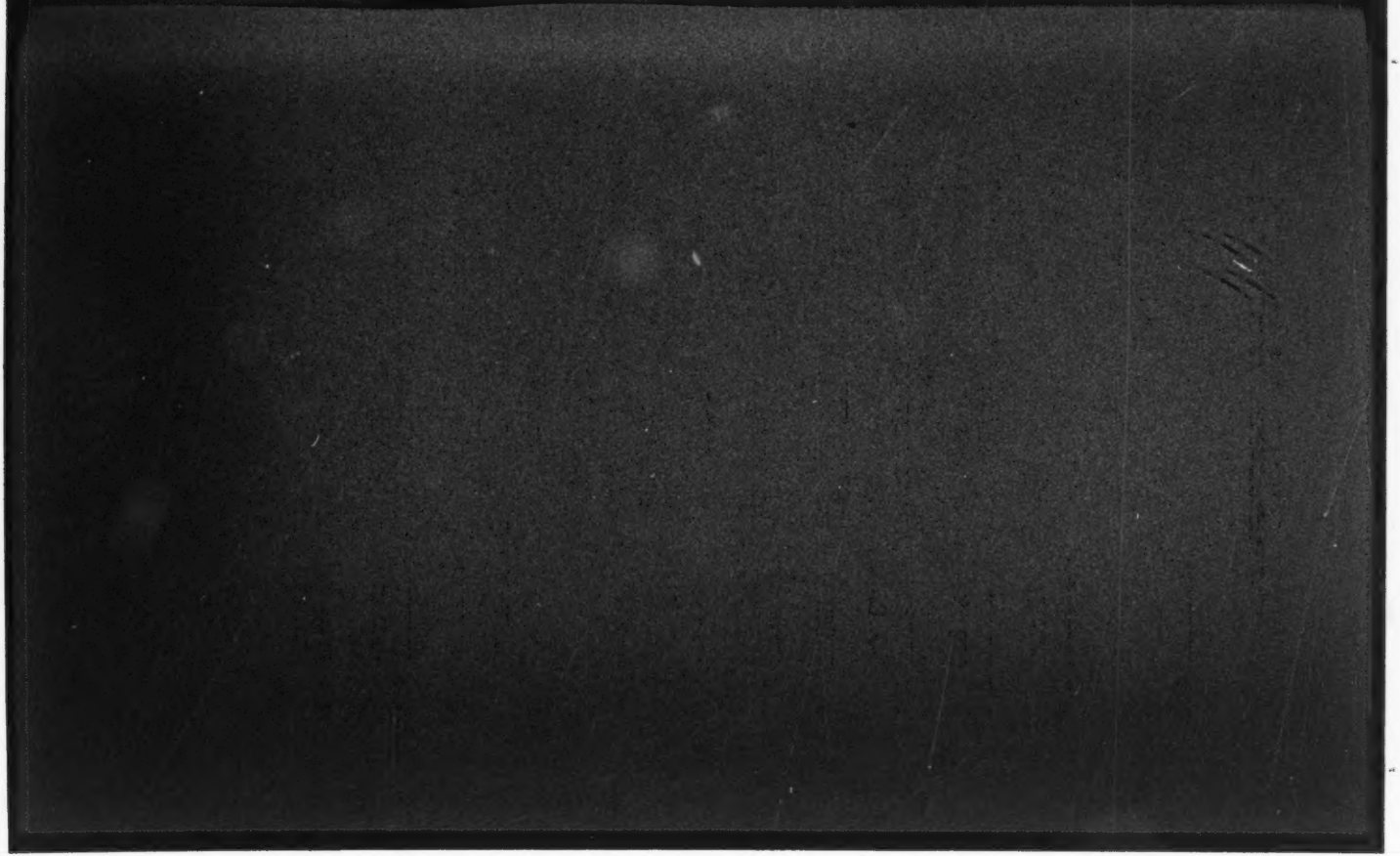

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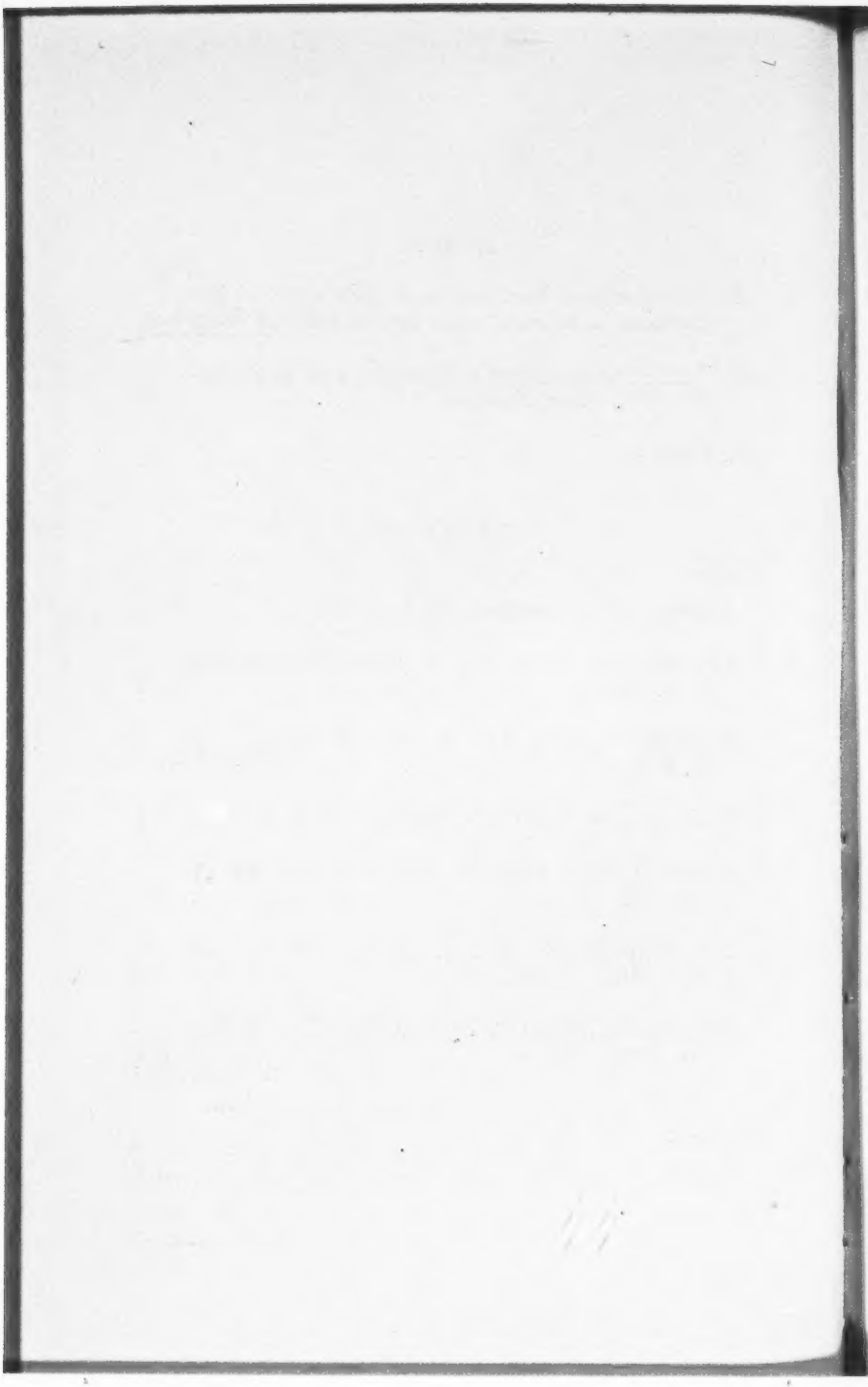

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I.

The Question Involved Is of Such National Importance As To Require the Granting of the Writ.

The Brief for the United States in Opposition is not addressed to the "Reasons for Granting the Writ" (Brief, 4-6), but is addressed solely to the *merits* of the fundamental question involved—Was there a confiscation of

property, for which just compensation is due, under the Fifth Amendment to the Constitution, when there was no physical taking of the property, but when an owner of the property was so deprived of its only use, for the benefit of the public, that the owner could make no use of the property at all—to its pecuniary loss?

The Writ should, therefore, be granted, so that this question may be answered by this Court for the benefit of Congress, as well as the public.

If this question had been previously answered, there being innumerable decisions involving the Fifth Amendment to the Constitution, then there was no occasion for the granting of the Writ, in the case of *The United States, Petitioner, v. Peewee Coal Company, Inc.*, 71 Sup. Ct. Rept. 670, upon application of the United States, and the divergent views of Justices of this Court in reaching the final conclusion affirming the decision of the Court of Claims.

Actually, the specific question involved herein has never been completely decided by this Court and is of extreme national importance.

Congress, during the last generation, at the request of the Presidents and to meet innumerable national emergencies, has either passed laws which transcended the bounds of the Constitution, or has given to the Executive branch powers over the individuals which would have made Hamilton succumb to the position of Madison respecting the use of Federal power for the general welfare, had he thought such laws would ever be passed.

Several times, this Court has had to say that the Constitution could not so be flaunted, or has required just compensation under the Fifth Amendment to the Con-

stitution. Order L-208 involved herein is well within this category of powers, as exercised upon the property of this Petitioner, which require compensation under the Fifth Amendment.

In the Brief in Opposition, page 6, the Government says that the limitation order involved—L-208—was "only one of hundreds of similar orders, affecting virtually all phases of industrial activity and businesses". For that reason, apparently, the action taken is to be condoned. Then, at page 12, note 5, the Government, at least *arguendo,* accepts Petitioner's statement, which is true, that L-208 was the *only* order of its kind issued—which shut down completely a small, but important, industry and forced—not as an incident but directly—this Petitioner to go out of business, for the asserted benefit of the public. Then, the Government suggests that, as there are only two other such cases pending and the statute of limitations will expire by June 30, 1951, the question is not of general importance.

The tenor of the Brief of the United States in Opposition, stated simply, is that the Government, in time of national emergency, can do anything to an individual, or to his property, by order or regulation, short of actually "taking" his property, for the benefit of the Nation, without being obligated to make any compensation whatsoever.

That is a typical totalitarian doctrine. That, in itself, is a question of national importance, which the people have the right to have answered. What was done to the Gold Mining Industry—by Order L-208—could be done to newspapers, or to any other industry.

The Respondent, except by footnote, has not dared to suggest that this question is not of national importance, because it is.

For the reasons given, at pages 4 to 6 of the Brief, the Writ should be granted.

II.

The Decision Below Is Incorrect and Is in Conflict With Other Decisions.

The decisions relied upon by the United States involve *some* degree of control, *some* degree of regulation, or the paramount right of the Government to use underwater lands for the purpose of improving navigation, without being required to make compensation to the abutting upland, but they do not, in any case, involve such a control, or regulation, as to constitute a "taking" of property (other than for the improvement of navigation), a fact present in this case. The other cases are cited to support the conclusion that there must be a direct invasion of property or physical taking over of it, to give rise to a claim for which the United States must make compensation under the Fifth Amendment. Relying upon these cases, the United States suggests that the decision below is correct and that it does not conflict with any applicable decisions of this Court.

The case of *Pa. Coal Company* v. *Mahon*, 260 U. S. 393, is completely contrary to both groups of cases cited by the United States, and to the conclusions drawn from them.

There, we find no physical taking, but a regulation, pure and simple, which was held to go so far as to constitute a "taking". (Brief, p. 8-9.)

There was no "taking" in *Hadacheck* v. *Sebastian*, 239 U. S. 334 (wherein Ex parte Kelso, 147 Cal. 609 is cited

with approval). In *International Paper Co.* v. *United States,* 282 U. S. 399, it was more a degree of interference than a taking. Again, in *Kimball Laundry Co.* v. *United States,* 338 U. S. 1, while there was a taking of the laundry, for which rent was paid, there was no taking of the "routes", for which compensation was paid under the decision of this Court. It was the damage to the owner for being deprived of the use of its routes, for which this Court ordered compensation.

The ultimate conclusion reached by the Court of Claims in *Royal Holland Lloyd* v. *United States,* 73 Ct. Cl. 722, should have been applied to this case.

In the *Royal Holland* case, the plaintiff was merely refused clearance papers for a period of time. When the ship was seized, the owner was paid. The Court awarded a sum for damages to the owner for detention of the vessel, because the owner was deprived of its use prior to seizure. No one benefited, but the owner sustained a pecuniary loss. So, in the instant case. The two cases are decided parallel. It is hard to conceive that this Court would ever find greater rights, under the Constitution, in favor of foreigners, than those of ordinary American citizens.

St. Regis Paper Co. v. *United States,* 110 Ct. Cl. 271, cert. den. 335 U. S. 815, is cited by both parties. Petitioner urges that one of two things is true, either it is distinguishable, as urged by Petitioner in its Brief, or it is as wrong as the decision below in the subject case.

It is distinguishable for three very important reasons. It is obvious from the decision in the *St. Regis* case that the plant which the owner closed could be used for more than one purpose. In fact, when not allowed to make kraft pulp, it requested permission to use the plant to make nitrating pulp or multiwall bags for civilian and

war uses, a very different use of the property to which it could be put. The plant could undoubtedly have been used for other purposes. The gold mine of this Petitioner could be used for only one purpose—to mine gold, and Petitioner was prohibited from putting the mine to that single use. Furthermore, *St. Regis Paper Co.* was not ordered to shut down its plant. It was free to operate it for any purpose other than the restricted purposes. Petitioner, by Order L-208, was ordered to shut down its mine, to cease to operate its property, for the only purpose to which it could be put—mining gold.

One end sought—and one result of Order L-208—was to draft men for the copper mining industry indirectly—which could not be done directly. The other result was to deprive Petitioner of the sole use to which its property could be put for the benefit of the general welfare, to the pecuniary loss of this Petitioner. This was also the *direct end* sought by Order L-208. It was not merely an incident thereto, as was Order M-251, involved in the *St. Regis* case, a third, and important, distinguishing feature.

However, if the two cases be held similar in effect, which Petitioner strongly urges is not the fact, then both decisions are wrong.

The Government may not, under the guise of a regulation, order an industry, or one segment of it, to close its doors completely, directly or indirectly, without that act amounting to a taking of property, for which compensation is required under the Fifth Amendment to the Constitution.

The fact that *certiorari* was not granted in that case is not significant. The cases are distinguishable. Even if held not to be, this Court has since granted a writ in one of the two important Government control cases,

The United States v. *Peewee Coal Co., supra,* and should grant a writ in this case, so that we may know to what extent the Government is going to be permitted to go to control the lives of its people and the industry of the country in the name of the general welfare.

The fact that the Government did not acquire any interest in the property—either in the *St. Regis* case, as noted by Respondent, at page 13, or in this case, is of no importance whatsoever. The test is loss to the owner, not gain to the Government. The *United States* v. *Peewee Coal Co., supra, Kimball Laundry Co.* v. *United States, supra, Royal Holland Lloyd* v. *United States, supra.*

III.

Damages.

The subject case is well within the opinion of the majority as well as of the dissenting Justices in *The United States* v. *Peewee Coal Company, Inc., supra.* In that case, the dissenting Justices objected to the conclusions of the majority because they were of the opinion that it had not been found that the Government had taken something of compensable value from the company, *"or that the Government subjected the company to any pecuniary loss"*. In the subject case, the Government very definitely subjected the Petitioner to pecuniary loss—the cost of keeping up a property completely shut down by order of the Government. This was a definite and real "loss to the owner", in the sum of $72,584.38. This entire Court could readily reverse the Court below upon the basis of the opinions in the *Peewee Coal* case.

Petitioner is not seeking compensation for loss of profits, something present in other war cases, relied upon by the United States. Petitioner claims damages in the sum of $72,584.38, only on account of the actual expense to which it was put to conserve its property, by reason of the fact that the Government ordered it to close down its every operation, for the benefit of the general welfare. This amounted to a "taking", for which the Fifth Amendment requires the compensation claimed.[1]

Respectfully submitted,

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[1] The fact that Bills introduced in Congress have provided that Petitioner and others be permitted to be paid by the Treasury Department rather than be forced to go to the Court of Claims, (Resp. Brief, p. 17, Note 8), is by no means an implication that Congress believed that there was no legal remedy under the Fifth Amendment to the Constitution. Rather is the implication that certain members of Congress sought to provide compensation for all of the mine owners rather than require that each be forced to sue to recover.